87 1067

No.

Supreme Court, U.S.
FILED
DEC 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
Respondent,

-vs.-

DUANE HOWELL,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a charge of "conscious avoidance" instead of "proof beyond a reasonable doubt" is constitutionally permissible in a criminal case requiring specific intent? (5th and 14th Amendments, United States Constitution).

2. Whether the trial court's ruling that the important defense witness Kassover be precluded from testifying with respect to certain exculpatory matters concerning the petitioner, deprived Howell of his ability to defend himself and to compel the testimony of witnesses in his behalf in a meaningful sense? (5th and 6th Amendments, United States Constitution).

3. Whether petitioner received a fair trial in view of various evidentiary rulings of the trial court? (5th Amendment, United States Constitution).

PARTIES

The parties in the United States Court of Appeals for the Second Circuit were petitioner and the United States of America.

Although a separate trial was held for Dean Wilson Sanders and Elaine Carol Sanders, the appeals were argued jointly. The Sanders, however, are not a party in this petition.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
Respondent,

-vs.-

DUANE HOWELL,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Second Circuit is annexed hereto as Appendix B.

JURISDICTION

A. The order of the United States Court of Appeals for the Second Circuit, which affirmed the judgment of the United States District Court for the Southern District of New York convicting petitioner of violating 18 U.S.C. §1001 was rendered on the second day of October 1987. A petition for rehearing was filed and the United States Court of Appeals denied a rehearing on the tenth day of November 1987. A copy of the respective orders are annexed hereto and made a part hereof as Appendices B and C, respectively.

B. The nature of the proceeding in the court below was a prosecution for filing false statements with the Internal Revenue Service and conspiracy to do so in violation of 18 U.S.C. §371 and 18 U.S.C. §1001. It was alleged that the petitioner, a Certified Public Accountant in the State of New York, who was assisting Dean Wilson Sanders and Elaine Carol Sanders with certain tax returns, had willfully and knowingly made false statements to the Internal Revenue Service in connection with that representation. The defense was that any information which Howell gave to the IRS was as a result of information he himself had received from the Sanders. Petitioner alleged in the court below that he was deprived of a fair trial because of the fact that he was not permitted to make a proper defense since his main witness, Kassover, was precluded from testifying about certain exculpatory facts. Furthermore, that he was also found guilty upon a standard of proof which was well below "proof beyond a reasonable doubt", since the trial court told the veniremen that they could apply a standard of "conscious avoidance" as a substitute for finding proof beyond a reasonable doubt. Howell also alleged that various other rulings of the trial court had deprived him of a fair trial. He did not testify.

C. The jurisdiction in this Court lies under 28 U.S.C. §1254 and §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED HEREIN

The 5th and 6th Amendments of the United States Constitution are involved herein. §371 and §1001 of Title 18 of the United States Code are also involved.

The Fifth Amendment is germane with respect to the requirement that a defendant in a criminal case be accorded "Due Process of Law". The Sixth Amendment is involved on the grounds that the petitioner was not permitted to fully exercise his right to compel testimony in his behalf and was also deprived of the effective assistance of counsel.

Section 371 of Title 18 of the United States Code relates to conspiracy to commit a crime, namely, to give false information to the IRS. Title 18 §1001 is involved to the extent that it forbids knowingly and willfully supplying false information to a Governmental authority such as the IRS.

STATEMENT OF THE CASE

The petitioner, Duane Howell, at all times mentioned herein was and still is a Certified Public Accountant, licensed to practice in the State of New York. The charges brought against him arose from an audit of certain tax returns of Dean Wilson Sanders and his wife, Elaine Sanders.

In essence the IRS maintained that the petitioner had

supplied misleading and false information in connection with that audit, whereas petitioner's point of defense was that any information which he supplied was derived from discussion and information which he himself had obtained from the Sanders. Although both Dean Wilson and Elaine Sanders were also indicted along with Howell, their case was severed from that of petitioner and he was tried separately and apart from them.

As a result of this severance, however, the petitioner was severely prejudiced because he was unable to adduce certain important exculpatory evidence that he would have been able to submit in a joint trial with the Sanders.

The only defense witness was another accountant by the name of Kassover who had also represented the Sanders in connection with preparing certain tax returns.

Kassover, who testified at the Sanders trial for the Government, revealed that the Sanders had supplied him with false information upon which he relied to prepare their returns.

The court below and the District Court precluded the petitioner from adducing similar evidence from Kassover to the effect that the Sanders had supplied him with false information in order to prepare tax returns.

This was the entire thrust of Howell's defense, namely that the Sanders were responsible for supplying him with misleading and false information, upon which he relied, and as a result of which he was indicted, along with them.

Kassover, who was not indicted, would have been an important defense witness if he had ben able to relate to the jurors that he had been mislead and misinformed by the Sanders in connection with the preparation of their

tax returns.

The District Court, inexplicably, refused to permit this evidence to be adduced from Kassover.

Thus, one of the main, and perhaps the most important, defenses of the petitioner was stifled by the ruling of the District Judge.

[The briefs and the records, upon request of this Court, will be supplied.]

It is important to note that much of the material supplied to the IRS was obtained from the Sanders' files and not from Howell's files. Another accountant by the name of Glassberg allegedly was involved in preparing returns for the Sanders and it was his firm who came to the conclusion that the Sanders owed a great deal of money to the IRS.

Yet, Howell never saw the tax return prepared by Glassberg. He only saw the working papers.

A secretary who worked for Howell and did some work for the Sanders on weekends, Delores Buckenberg, was called as a Government witness. The Government was permitted to range far and wide with her about various wholly unrelated and prejudicial matters concerning her which unquestionably impacted upon Howell. For example she had originally indicated that she would cooperate with the Government, but then decided not to do so. A great deal of totally irrelevant evidence was adduced concerning the events which only prejudiced Howell but did not have anything to do with his case. There was a good deal of evidence that was in the record indicating that Howell used proper accounting procedures and that whatever information he gave to the

IRS, he relied primarily upon what the Sanders gave to him.

In the District Court, the Government was permitted to make a great deal of the fact that Howell informed the Sanders that they could file their tax returns in any revenue district and not necessarily in New York.

We submit that there was nothing illegal about this since the tax returns were in fact filed.

A great deal of information concerning fraudulent practices by the Sanders, not related to supplying false information to Howell, was allowed into evidence at petitioner's trial. This was highly prejudicial for petitioner and he had no ability to defend against it because of the fact that the Sanders' case had been severed.

The evidence showed that a great deal of the Government's case was predicated upon work done by a junior accountant named Michael Holden who worked for the Glassberg firm.

This junior accountant was wholly inexperienced and was completely wrong in many of the aspects of the work that he performed.

Additionally, an IRS Agent by the name of Dennehy, was permitted to testify as an expert even though he lacked substantial expertise. Defense counsel for Howell unfortunately did not sufficiently challenge credentials of this "expert".

Dennehy gratuitously testified that certain entries, in his opinion, were fraudulent and that documents that were submitted with these returns were false documents.

Yet he was unable to say that he believed that Howell was fraudulent. He could not give an opinion on that aspect.

It must be borne in mind that Howell was a busy accountant who represented many other clients and was involved in many enterprises. There was no evidence that he knowingly, willfully and intentionally gave false information or made false statements to the IRS with respect to any aspect of the case. This was dependent upon the amorphous concept of "conscious avoidance".

POINT I

PERHAPS THE MOST ESSENTIAL SAFEGUARD OF A DEFENDANT IN A CRIMINAL CASE IS THAT THE STANDARD OF PROOF REQUIRED TO CONVICT HIM MUST BE "PROOF BEYOND A REASONABLE DOUBT". IN THE CASE AT BAR, THE JURY WAS PERMITTED TO CONSIDER A LESSER STANDARD, NAMELY "HIGH PROBABILITY", BECAUSE THE TRIAL JUDGE CHARGED THEM THAT IF THEY DETERMINED THAT THE PETITIONER HAD "CONSCIOUSLY AVOIDED" LEARNING CERTAIN FACTS, THAT THAT WAS SUFFICIENT TO WARRANT RETURNING A VERDICT OF GUILTY.

In a number of cases such as *In re Winship*, 1970, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, this Court has explained the importance of not diluting the requirement for proof beyond a reasonable doubt in any criminal case:

"Moreover, use of the reasonable-doubt

> standard is indispensable to command respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law should not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

In a criminal case, the burden is always upon the Government to establish guilt of every material element of the crime beyond a reasonable doubt. (*Davis v. United States*, 1895, 160 U.S. 469, 487, 16 S. Ct. 353, 358; See also *Sandstrom v. Montanna*, 1979, 442 U.S. 510, 99 S. Ct. 2450.)

In *Sandstrom v. Montanna, supra,* the Supreme Court made it clear that the need to prove guilt beyond a reasonable doubt cannot be diluted by giving the jury an instruction which may beguile them into believing that a lower or lesser standard is sufficient.

As a matter of fact, in *Connecticut v. Johnson*, 1983, 460 U.S. 73, 103 S. Ct. 969, the Supreme Court held that an instruction such as that given in *Sandstrom* was of such a virulent impact, that it could never be considered to be harmless error.

In the case at bar, as well as in several other cases, the Second Circuit has seen fit to substitute a "conscious avoidance" standard where criminal intent is involved for the requirement of proof beyond a reasonable doubt. (See, *e.g.: United States v. Mankani*, 730 F. 2d 538, 547 (2d Cir. 1984); *United States v. Lanza*, 790 F. 2d 1015 (2d Cir. 1986), and *United States v. Heinemann*, 801 F. 2d 86 (2d Cir. 1986)).

Jackson v. Virginia, 440 U.S. 307, 99 S. Ct. 2781, *Mullaney v. Wilbur*, 421 U.S. 684 95 S. Ct. 1881, *Taylor v. Kentucky*, 436

U.S. 478 98 S. Ct. 1930, and other cases all point to the fact that this Court has consistently held that in any criminal case, proof must be adduced beyond a reasonable doubt in order to convict someone.

The equivocal standard of "conscious avoidance" diminishes that burden to that of "high probability" which we submit is a concept that no jury can understand.

In *Jackson v. Virginia, supra,* reasonable doubt is defined as a "subjective state of near certitude".

What does "high probability" mean? There is virtually no judicial or statutory interpretation that defines that phrase, adequately.

Accordingly, we maintain that the charge to the jury that it may consider conscious avoidance as a substitute for proof beyond a reasonable doubt as to criminal intent and that aspect of the case, precludes a fair trial and violates Due Process of Law.

POINT II

THE SIXTH AMENDMENT OF THE CONSTITUTION GUARANTEES IN ALL CRIMINAL PROSECUTIONS THAT THE ACCUSED SHALL HAVE THE RIGHT TO "HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR", AND TO "HAVE ASSISTANCE OF COUNSEL IN HIS DEFENSE". IN THE CASE AT BAR, HOWELL WAS PREVENTED FROM ADDUCING "FAVORABLE" TESTIMONY FROM THE ONLY DEFENSE WITNESS, KASSOVER, BECAUSE THE COURT RULED THAT SUCH EVIDENCE WAS INADMISSIBLE.

The defense, in the case at bar, was very simple, namely, that Howell, a Certified Public Accountant, had received information from his clients for whom he was preparing tax returns, namely the Sanders, which information was false and misleading.

Howell, understandably, used this information in connection with the preparation of the tax returns which were ultimately submitted to the IRS and which formed the basis for the charges against Howell and the Sanders herein.

While Howell did not take the witness stand, which was his privilege, he nevertheless had the unqualified right under the 6th Amendment to call witnesses in his behalf and in that regard subpoenaed the accountant Kassover as the only defense witness.

Kassover had also represented the Sanders in connection with the preparation of tax returns and would have

been able to testify if permitted to do so, that he received false and misleading information from the Sanders as a result of which the tax returns which he prepared were rife with false information.

Such testimony would have bolstered Howell's line of defense because it would have shown a pattern on the part of the Sanders, and that Howell, an accountant like Kassover, was duped by his clients and could not have been responsible for willfully, knowingly, and intentionally supplying false information to the IRS.

The trial judge ruled that the testimony of Kassover was hearsay and therefore inadmissible.

This was an incorrect ruling and we submit that it severely prejudiced the defendant-petitioner.

While petitioner was indicted under 18 U.S.C. §1001, that section must be equated with title 26 United States Code §7206 (2) which relates to persons who aid or assist in making or filing fraudulent or false statements.

In *United States v. Bishop*, 412 U.S. 346, 360, this Court held that in order to convict under that section, it was necessary to find a "bad purpose or evil motive" on the part of the supplier of the information.

Under the circumstances of this case, no such evil purpose or bad motive was established.

As a matter of fact, the witness, Kassover, would have precluded the finding of such evil motive or bad purpose.

The petitioner had voluntarily given substantial statements to the IRS and it is obvious that he did not have the slightest inkling that he did something wrong, otherwise

he would have unquestionably have invoked his privilege under the 5th Amendment.

Advising a client as to methods of tax "avoidance" is not illegal. It is only where tax "evasion" is involved that criminality arises. In *Bullin v. Wisconsin*, 240 U.S. 25, Justice Holmes explained that tax "evasion" is a violation of law, but not tax "avoidance". Thus, when a man approaches a river which can be crossed by two bridges, one a toll bridge and the other a free bridge, if he passes on the toll bridge and fails to pay the toll, this is tax evasion. If, however, he crosses by way of the free bridge, this is tax avoidance and is not illegal.

We submit the record indicates that Howell believed that he was properly guiding his clients in avoiding taxes and not evading them.

Returning, however, to the ruling of the trial judge that Kassover could not testify as to what the Sanders told him, which turned out to be false information, we ask this Court to consider *Anderson v. United States*, 417 U.S. 211, where the Court held, *inter alia*, that where evidence is offered that certain statements were made, not for the purpose of proving the truth of the assertions, but rather to prove their falsity, that the statements, therefore, would not be hearsay and therefore are admissible.

Since the Sanders were indicted together with the petitioner, they were obviously co-conspirators and statements of a co-conspirator are not within the hearsay rule under the circumstances of this case.

The false information given to Kassover, constituted statements by co-conspirators which we submit are exceptions to the hearsay rule and the trial court failed to recognize it.

Furthermore, the false statements made to Kassover by the Sanders could be statements against penal interest and this, too, is an exception to the hearsay rule.

It must be borne in mind that the statements of Kassover concerning what was told to him by the Sanders was not being offered necessarily for the truth, but to show that the statements were made. (See *United States v. Rubin*, 591 F. 2d 278 (5th Cir. 1979) and *United States v. Abascal*, 564 F. 2d 821 (9th Cir. 1977)).

In *Chambers v. Mississippi*, 410 U.S. 284, this Court held that a rule of evidence should never be applied so remorselessly as to preclude a vital defense for a defendant on trial in a criminal case.

POINT III

OTHER EVIDENTIARY RULINGS BY THE TRIAL COURT PRECLUDED A FAIR TRIAL FOR HOWELL. THE FAILURE OF PETITIONER'S ATTORNEY TO OBJECT IN MANY INSTANCES, ALLOWED EVIDENCE WHICH SHOULD NEVER HAVE BEEN ADDUCED. THIS INCLUDED SO CALLED "EXPERT TESTIMONY" WHICH FELL FAR SHORT OF THE STANDARD WHICH ONE WOULD EXPECT FOR AN EXPERT. THUS, HOWELL WAS DEPRIVED OF A FAIR TRIAL.

By its rulings the trial court permitted considerable evidence concerning bad criminal acts by the Sanders which had nothing whatsoever to do with petitioner. This should have been excluded since the Sanders were severed and were not at the trial of Howell. Furthermore, extensive testimony addressed to Buckenberg

concerning her being granted "office immunity" and later declining to accept it, was highly prejudicial to Howell.

Agent Dennehy was permitted to characterize aspects of the tax returns of the Sanders as "fraudulent" when only the jury could determine that, and when, in essence, the items involved concerned disputed issues of deductibility.

In the court below, the Circuit Court noted that certain errors had not been protected because of counsel's failure to act upon objections. We submit that this is a manifestation of the inadequacy of counsel and consequently should have warranted a reversal rather than an affirmance.

CONCLUSION

The petition for Certiorari should be granted.

Respectfully submitted,

Irving Anolik
A member of the bar of this Court
Attorney for Petitioner
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New York, N.Y. 10007
(212) 732-3050

CERTIFICATION

IRVING ANOLIK, an attorney at law admitted to practice in this Court, certifies that a copy of this petition for Certiorari was duly served upon the Solicitor General of the United States, on the 23rd day of December, 1987, by first class mail addressed to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20543.

DATED: December 23, 1987
New York, New York

_____
IRVING ANOLIK

APPENDIX A

JUDGMENT AND COMMITMENT ORDER BY THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, DATED JANUARY 23, 1987

United States District Court for
SOUTHERN DISTRICT OF NEW YORK

Docket No. S86 Cr. 0325-03

UNITED STATES OF AMERICA,

-against-

DUANE HOWELL,
Defendant.

Date of Offense: 1/78-4/84

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: 01/23/87.

Counsel: With counsel, Ivan Fisher.

Finding & Judgment: There being a verdict of **GUILTY.** Defendant has been convicted as charged of the offense(s) of conspiracy to defraud the I.R.S. (18:371); false statements (18:1001,2)

Sentence or Probation Order: The court asked

whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convected and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) Months on counts S1, S11 and S12 pursuant to Section 3651 of Title 18, U.S.C. as amended with provision defendant be confined in a JAIL type institution for a period of SIX (6) MONTHS as provided in the aforesaid section. Execution of the balance of the sentence is suspended, and the defendant is placed on probation for a period of FIVE (5) YEARS, to commence upon expiration of confinement, subject to the standing probation order of this Court. Counts S1, S11 and S12 are concurrent.

Special Conditions of Probation: Defendant is to receive counseling for his alcoholic problem; perform 3 hours of community service per week and pay the costs of prosecution pursuant to Title 28, U.S.C. Section 1918 not to exceed $5,000.00.

Additional Conditions of Probation: Count 1 is dismissed on motion of defendant's counsel with consent of the Government. In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation: The court orders

commitment to the custody of the Attorney General and recommends, the defendant serve his sentence at F.C.I., Danbury, Ct.

Signed By: Senior U.S. District Judge

s/
Lee P. Gagliardi Date: 1-23-87

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

U.S. DISTRICT COURT
S. D. OF N. Y.
Filed Jan. 23, 1987

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By: s/
Deputy Clerk

APPENDIX B

ORDER AND DECISION BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT FILED OCTOBER 2, 1987

(TJM)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Second day of October, one thousand nine hundred and eighty-seven.

Present: HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE THOMAS J. MESKILL,
HONORABLE JON O. NEWMAN,
Circuit Judges

Docket No. 87-1089

UNITED STATES OF AMERICA,
Appellee,

v.

DEAN WILSON SANDERS,, ELAINE CAROL SANDERS and DUAN HOWELL,
Defendants,

DUANE HOWELL,
Defendant-Appellant.

This is an appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, Gagliardi, *J.*, convicting Duane Howell after a week jury trial of conspiring to defraud the Internal Revenue Service (IRS) in violation of 18 U.S.C. §371 (1982), and making false statements in a matter within the jurisdiction of the IRS in violation of 18 U.S.C. §§1001 and 1002 (1982).

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of the district court is AFFIRMED.

Howell bears a very heavy burden in challenging the sufficiency of the evidence sustaining his conviction. *United States v. Martino*, 759 F. 2d 998, 1002 (2d Cir. 1985). Howell has failed to carry this burden of demonstrating that there was insufficient evidence presented at trial for a jury reasonably to conclude that Howell had the requisite intent to defraud the IRS.

Howell's arguments concerning the district court's evidentiary rulings are without merit. The court did not abuse its discretion by cutting off the questioning of Ronald Kassover; Howell had been permitted to examine Kassover at length, and the district court correctly concluded that any further testimony would be irrelevant. We need not consider on this appeal the other evidentiary issues that Howell raises because they were not raised in the first instance in the district court. *United States v. Canniff*, 521 F. 2d 565, 572 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976).

We have considered all of Howell's other arguments and find them to be without merit.

s/
Ellsworth A. Van Graafeiland, U.S.C.J.

s/
Thomas J. Meskill, U.S.C.J.

s/
Jon O. Newman, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
Oct. 2, 1987
Elaine B. Goldsmith, Clerk

APPENDIX C

ORDER AND DECISION ON REHEARING BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED NOVEMBER 10, 1987

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 10th day of November one thousand nine hundred and eighty-seven.

No. 87-1089

UNITED STATES OF AMERICA,
Appellee,

v.

DEAN WILSON SANDERS, ELAINE CAROL SANDERS and DUANE HOWELL,
Defendants,

DUANE HOWELL,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendant-Appellant, Duane Howell,

Upon consideration by the panel that heard the appeal it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/
Elaine B. Goldsmith,
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
Nov. 10, 1987
Elaine B. Goldsmith, Clerk